

# Davies Commission

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Legal and Ethical Issues - Criminal Justice Branch -  
Policy Phase

# Overview - Conflict of Interest

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- investigational conflict
  - remedial steps by Crown to correct or identify investigative deficiencies
  - impact of neutral RTCC on charge assessment
  - post-IIO issues:
    - who should approve charges?
    - should charge assessment be sought in every case?

# Overview - Conflict of Interest

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- prosecutorial conflict
  - Crown/police relationship may compromise prosecutorial independence
  - examine CJB policy and consider:
    - modifying existing policy
    - adopting completely new policy

# Investigative Conflict

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- creation of IIO reduces importance of investigative conflict
- residual importance:
  - during period up until IIO begins operation
  - looking back at charge assessment in Paul case

# Investigative Conflict - Problems for Crown

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- RTCC reveals incomplete investigation
- RTCC complete on face but lack confidence in investigation
- possible remedies include:
  - request/force further police investigation
  - undertake own investigation
  - conduct independent audit of police investigation

# Independence of Police

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- Police are independent from Crown (and everyone else) (R. v. Campbell, [1999] 1 S.C.R. 565)
- Rationale: (a) supports rule of law: (b) checks and balances
- Police nonetheless have a duty to investigate diligently, competently, impartially (Beaudry, [2007] 1 S.C.R. 190)

# Independence of Crown

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- constitutional principle of independence (Kreiger, [2002] 3 S.C.R. 372, paras. 29-32)
- rationale: overlaps with that supporting police independence
- Crown's "Boucher" duties:
  - promote justice fairly, objectively and impartially
  - independence must never be compromised

# Crown/Police Interdependence and Cooperation

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- Mutual independence is a foundational principle BUT:
  - It does not mean non-contact
  - Police/Crown are mutually interdependent
  - Police/Crown must work together to ensure justice is done

# Crown Involvement at Investigative Stage

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- Part VI authorizations (i.e. “wiretaps”)
- preparing search warrants
- operational plan advice
- immunity agreements
- preparing Crown brief (i.e. RTCC)
- disclosure management
- general advice
- interviewing witnesses

# R. v. Regan, [2002] 1 S.C.R. 297

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- Affirms mutual independence of Crown/police
- Recognizes Crown/police must work together
- Crown must not act so as to compromise Boucher duties
- Witness interview proper if fulfills prosecution function
- But improper where Crown takes on police investigative role

# Investigative Conflict: Remedial Crown Action

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- Crown has duty to request further investigation
- Crown has no power to require further investigation  
(Beaudry SCC)
- Crown cannot conduct own investigation
- Crown cannot conduct independent audit of police investigation

# Conclusion: Crown Remedies for Investigative Conflict:

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- Crown must remain objective and independent - cannot take on investigative role
- imposing new duties on Crown to alleviate investigative conflict is ill-advised
- preferable response is to create IIO

# Impact of Neutral RTCC on Charge Assessment

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- a neutral RTCC:
  - includes no police recommendation regarding charges
  - does not attempt to relate evidence to elements of charge
  - provides no opinion regarding witness reliability
- a neutral RTCC is otherwise comprehensive and complete

# Neutral RTCC Does Not Materially Hinder Crown Charge Assessment

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- Crown can ascertain what charges may be engaged
- Crown can ascertain what evidence relates to offence elements
- Crown can assess witness reliability

# Neutral RTCC Nonetheless Not Ideal

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- providing charge recommendation and relating evidence to charge elements is preferable because:
  - it encourages comprehensive and focussed RTTC
  - it may alert police to other avenues of investigation
  - it promotes police/Crown “checks and balances”
- pre-assessment legal advice from Crown may preempt neutral RTCC

# Charge Approval in IIO Cases: IIO Director or Prosecutor?

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- B.C. prosecutors make charge approval decision in criminal investigations
- no reason to treat IIO cases differently
- Braidwood Report recommends charge approval by prosecutor

# Charge Assessment Needed in Every IIO Case?

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- assessment not always sought in other criminal investigations
- no reason in principle to treat IIO cases differently
- IIO Director should seek charge assessment only where of the view the charges are or may be warranted

# Prosecutorial Conflict: Introduction

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- the issue: possibility Crown objectivity and impartiality compromised because suspect/accused is police officer
- scope of analysis:
  - police-related incidents involving death/serious harm
  - not only PRD cases

# Prosecutorial Conflict: Analytical Framework

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- conflict: representation of a client is materially and adversely affected by a conflicting interest (Neil, [2002] 3 S.C.R. 631)
- Crown conflict: competing interest undermines prosecutor's ability to maintain independence, objectivity and impartiality (Boucher duties)

# Potential for Conflict in Police-Related Matters Framework

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- close working relationship between Crown and police
  - personal and institutional
  - retrospective and prospective
- risk of favouritism:
  - tendency to help the officer/institution
  - aversion to harming the relationship in the future

# Reasonable Perception/Appearance of Conflict

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- perception/apprehension of conflict by a reasonable and informed member of public
  - maintains and promotes public confidence in system
  - ascertaining actual conflict very difficult (especially in charge assessment context)

# Main CJB Written Policy: “Police - Allegations Against Police Officers”

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- charge assessment (emphasis added):
  - In order to ensure that there is no perception of conflict of interest and to maintain public confidence in the administration of criminal justice, the charge assessment decision on an allegation against a peace officer must be made by either Regional Crown Counsel or the Director, Legal Operations

# Charge Assessment Breakdown

- by Reg. Crown unless concern re “objectively reasonable perception” of COI or maintaining confidence in justice system
- if Reg. Crown makes decision, “should” send report to Director
- if Director makes decision, is based solely on memo by Reg. Crown (not RTCC)
- Reg. Crown’s memo includes own opinion unless COI problem
- where Reg. Crown and Director differ, refer to ADAG

# Responsibility for Any Ensuing Prosecution

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- prosecutor designated by Reg. Crown on considering:
  - whether officer is or was employed in the jurisdiction
  - whether incident occurred in course of duty or duty-related activities
  - whether offence is particularly serious or has considerable public profile
- should consider appropriateness of using Crown from outside local jurisdiction or ad hoc counsel from private bar

# Possible Applicability of Other CJB

## Policies

- CJB general conflict of interest policy

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  - can use outside counsel to conduct charge assessment
  - unclear whether this policy can apply in IIO cases
- CJB policy concerning special prosecutors
  - “significant potential for real or perceived improper influence in prosecutorial decision-making”
  - suggests special prosecutor will be used in cases involving “senior police officers”

# Assessment: Current CJB Policy

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- flexibility
- carefully tailor response to risk of COI as it appears in circumstances of particular case

# Current CJB Policy: Possible Modifications

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1. Explain why police-related cases raise COI concerns.
2. Allow use of outside counsel at charge assessment stage.
3. Mandate review by more than one person.
4. Always prohibit local counsel, including Reg. Crown, from involvement in the charge assessment or prosecution.

# A Different Approach: Adopting a New Model

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- Alternative: adopt completely new model such as:
  - create special CJB unit to handle IIO matters
  - always refer IIO matters to counsel outside the CJB

# Special CJB Unit

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- existing model: Justice Prosecutions in Ontario
- advantage: reduces current contact with police
- disadvantages:
  - located in CJB
  - past and future work with police
  - still some current work with police
  - efficiency of scale problems

# Always Using Outside Counsel

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- existing model: Manitoba's use of independent counsel
- advantages:
  - completely removes perception of COI
  - bright line-rule, easily applied
  - B.C. has tradition of using outside counsel
- recommended in Braidwood Report

# Always Using Outside Counsel

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- Opposing View: Stephen Owen's Special Prosecutor Review
- Mr. Owen's arguments against always using outside counsel:
  - system overload
  - undermining public confidence in CJB
  - outside counsel may suffer from COI (overload reprise)

# Prosecutorial Conflict: Conclusion

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- preferable response to prosecutorial conflict:
  - use outside counsel in all IIO matters
- alternative response:
  - amend current Branch policy to strengthen protections against a perception of conflict